

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STEWART A. RIDING,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of Social Security,

Defendant.

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No. CV-10-0220-CI

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 19.) Attorney Rebecca Coufal represents Stewart Riding (Plaintiff); Special Assistant United States Attorney Richard Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 3.) After reviewing the administrative record, the governing statutes and regulations, briefs and exhibits filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

**JURISDICTION**

Plaintiff filed for Social Security disability insurance benefits (Social Security disability benefits) on August 5, 1998, alleging an onset date of January 20, 1996. (Tr. 16.) He was awarded Social Security disability benefits on November 17, 2004. The Social Security Administration (SSA) determined his DIB award was reduced because he received public disability benefits under the

1 Civil Service Retirement System earned while he was working as a  
2 federal civil servant. (Tr. 25-31.) Plaintiff requested  
3 reconsideration of the disability benefit offset, and on December  
4 24, 2006, the SSA affirmed the offset determination and  
5 calculations. (Tr. 37-41.) Plaintiff requested a hearing before an  
6 administrative law judge, which was held on August 21, 2007, before  
7 ALJ John Crickman. Plaintiff, who was represented by counsel,  
8 testified. (Tr. 59-117.) On November 5, 2007, ALJ Crickman  
9 affirmed the administrative agency's determination, finding the  
10 public disability benefit offset was calculated correctly. (Tr.  
11 16-18.) The Appeals Council denied review and this appeal followed  
12 pursuant to 42 U.S.C. § 405(g).

#### 13 **STATEMENT OF THE CASE**

14 Plaintiff was 57 at the time of the hearing. (Tr. 69.) He  
15 testified he had served in the United States Army from 1969 to 1972,  
16 after which he worked as a civil service military technician with  
17 the Utah National Guard (Army). As a civil service employee,  
18 Plaintiff earned retirement coverage under the federal Civil Service  
19 Retirement System (CSRS). Plaintiff testified the civil service  
20 position required him to be a member of the Utah National Guard.  
21 (Tr. 73.) Plaintiff earned social security retirement coverage when  
22 performing his National Guard duties (active and reserve) under the  
23 Act. Plaintiff was sent for active duty during Desert Storm, at  
24 which time he was injured. In 1996, he left his civil service job  
25 and resigned from the National Guard due to disability. He was  
26 awarded VA disability benefits (not in dispute here), and a CSRS  
27 disability pension. His initial CSRS payment was \$1,264.00 per  
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1 month and, as of December 2008, was \$1,802.00. (Tr. 57.)  
2 Plaintiff's Social Security disability benefits monthly benefit  
3 beginning in August 1997 was \$290.70. (Tr. 56.) The SSA determined  
4 that under section 224(a) of the Act, Plaintiff's CSRS disability  
5 benefit completely offset the \$290.70 Social Security disability  
6 benefits benefit, and Plaintiff was entitled only to the annual cost  
7 of living increases applied to his benefit of \$290.70. (Tr. 37-41.)  
8 Plaintiff disputes the agency's calculation of the Social Security  
9 disability benefits reduction.

#### 10 ADMINISTRATIVE DECISION

11 ALJ Crickman found Plaintiff was disabled as of January 20,  
12 2006, and entitled to monthly Social Security disability benefits of  
13 \$290.70, based on his earnings subject to Social Security taxes  
14 ("covered wages"). (Tr. 17.) He found Plaintiff was entitled to  
15 federal public disability benefits beginning in 1996 through the  
16 Federal CSRS, based on his earnings as a civil service employee,  
17 which were not subject to Social Security taxes ("uncovered wages"),  
18 with monthly payments starting at \$1,264.00 and increasing annually.  
19 *Id.* In his summary of the SSA's calculation of benefits, the ALJ  
20 found Plaintiff's CSRS benefit of \$1264.00 exceeded \$883.00, which  
21 is 80% of Plaintiff's average current earnings (ACE), as defined by  
22 the Act. Therefore, his Social Security disability benefits were  
23 offset completely by his CSRS benefit, and he was entitled only to  
24 cost of living increases.<sup>1</sup> (Tr. 18.) The ALJ concluded the  
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27 <sup>1</sup> Certain protected increases in social security benefits,  
28 including cost of living increases, are not offset by public

1 agency's disability benefit calculations on reconsideration are  
2 correct.<sup>2</sup> (*Id.*)

3 **STANDARD OF REVIEW**

4 The court's review of the SSA's determination is narrow. 42  
5 U.S.C. § 405(g). Where there is a dispute over the proper  
6 interpretation of an agency regulation, if the Commissioner's  
7 interpretation is reasonable, it is entitled to deference by the  
8 reviewing court. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9<sup>th</sup> Cir.  
9 2000). Even where a provision of the Social Security Act is  
10 ambiguous, the court accords deference to the Social Security  
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12 disability benefits. Social Security Act § 224; 42 U.S.C. § 424a;  
13 (Tr. 39.)

14 <sup>2</sup> Although the ALJ references the Windfall Elimination  
15 Provision (WEP) in Finding 4 of his decision (Tr. 18), he properly  
16 cited and analyzed the issues under Social Security Act § 224(a), 42  
17 U.S.C. § 424a, and 20 C.F.R. § 404.408. The Windfall Elimination  
18 Provision, 42 U.S.C. § 415, modifies the standard formula for  
19 initial calculation of social security primary insurance amounts  
20 when a person has earned covered and noncovered earnings during his  
21 career. *Das v. Department of Health and Human Servs.*, 17 F.3d 1250,  
22 1252 (9<sup>th</sup> Cir. 1994). Social Security public disability benefit  
23 offset provisions are applied to disability benefits earned during  
24 covered and noncovered employment. Although Plaintiff states the  
25 goal of WEP in general terms, he presents no legal argument that  
26 applies WEP to the facts before the court.  
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1 Administrations's reasonable interpretation of the provision. *Das*,  
2 17 F.3d at 1254. If there is substantial evidence to support the  
3 administrative findings, and the decision is free of legal error,  
4 the Commissioner's findings are conclusive. *See Sprague v. Bowen*,  
5 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 6 **ISSUES**

7 The question is whether the ALJ's decision is supported by  
8 substantial evidence and free of legal error. Plaintiff argues the  
9 ALJ erred in affirming the offset calculation. (ECF No. 14.)  
10 Specifically, he argues his earnings from his civil service  
11 employment should have been included in the calculation of the his  
12 "average current earnings" (ACE), used to determine whether an  
13 offset of Social Security disability benefits is required. He  
14 requests a recalculation by this court. (*Id.* at 9-10.)

#### 15 **DISCUSSION**

16 Under the Act, an individual eligible for Social Security  
17 disability insurance benefits concurrent with periodic public  
18 disability benefits may be subject to a reduction in Social Security  
19 disability benefits.<sup>3</sup> 20 C.F.R. § 404.408(a)(2)(I). As found by  
20 the ALJ, "An individual's Social Security Disability benefits will  
21 be reduced so that the total of Social Security disability benefits  
22 plus his monthly public disability benefits do not exceed the higher  
23 of all Social Security benefits on his record before the offset, or  
24 80% of his average monthly earnings." (Tr. 16.) Here, the record  
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27 <sup>3</sup> Statutory exceptions to the reduction are not at issue in  
28 this case. *See* 20 C.F.R. § 404.408(b).

1 shows that the SSA determined Plaintiff's monthly public disability  
2 benefit of \$1,298 in 1997 (CSRS disability benefit) exceeded the  
3 total Social Security benefits payable (\$290) and 80 percent of his  
4 "average current earnings" (\$833); therefore his Social Security  
5 disability benefit was completely offset. (Tr. 39.)

6 A person's "average current earnings" (ACE) are calculated in  
7 three different ways. 42 U.S.C. § 424a(a); 20 C.F.R. §  
8 404.408(c)(3). In this case, Plaintiff's ACE was calculated as  
9 1/12th of the total of his wages for the calendar year in which he  
10 had the highest wages and income during "the period consisting of  
11 the calendar year in which he became disabled and the five years  
12 preceding that year." 20 C.F.R. § 404.408(c)(3)(i)(C); (Tr 39).  
13 The record shows Plaintiff's highest covered wages and income earned  
14 in the relevant period was \$12,504.78, in 1991. (Tr. 19.) One  
15 twelfth of this wage, or Plaintiff's ACE under 20 C.F.R. §  
16 404.408(c)(3)(i)(C), is \$1,042.00. Eighty percent of Plaintiff's  
17 ACE is \$833.60. (*Id.*) Therefore, the SSA's calculation on  
18 reconsideration is correct.

19 Although Plaintiff does not dispute the application of the  
20 1/12th rule to calculate his ACE, he appears to argue the  
21 calculation should have included non-covered wages earned while a  
22 civil service employee, *i.e.*, wages that were not subject to the  
23 Social Security tax. (ECF No. 14 at 8-9.) Plaintiff's argument is  
24 unpersuasive.

25 An examination of the laws and regulations governing Title II  
26 social security benefits shows that "wages" are defined as  
27 "remuneration paid to you as an employee for employment unless  
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1 specifically excluded. Wages are counted in determining your  
2 entitlement to . . . disability insurance benefits." 20 C.F.R. §  
3 404.1041(a). (Emphasis added.) Wages for employment with the  
4 federal government are not considered remuneration for purposes of  
5 Social Security, unless they were received on or after the election  
6 of coverage under the Federal Employees' Retirement System (FERS)  
7 Act of 1986. 20 C.F.R. § 404.1018(a). Plaintiff neither alleges  
8 that he elected coverage under FERS at anytime, nor does he claim  
9 that his CSRS wages were subject to Social Security taxes.  
10 Plaintiff offers no legal authority for his contention that wages  
11 not subject to Social Security taxes are used to calculate Social  
12 Security disability benefits.

13 The Commissioner's interpretation of the applicable statutes  
14 and regulations is reasonable and supported by substantial evidence.  
15 The record includes sufficient documentation to support the factual  
16 basis for the ALJ's analysis. Plaintiff's public disability  
17 benefits received under the CSRS exceed 80% of his ACE; or \$883.00;  
18 therefore his Social Security disability benefits award is  
19 completely offset. The ALJ's determination that the agency's  
20 calculation of Plaintiff's ACE is correct is affirmed. Accordingly,  
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22 **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
24 **DENIED.**

25 2. Defendant's Motion for Summary Judgment (**ECF No. 19**) is  
26 **GRANTED.**

27 The District Court Executive is directed to file this Order and  
28 provide a copy to counsel for Plaintiff and Defendant. The file

1 shall be closed and judgment entered for Defendant.

2 DATED August 19, 2011.

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4 S/ CYNTHIA IMBROGNO  
5 UNITED STATES MAGISTRATE JUDGE  
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